No. 947

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

GULF-CANAL LINES, INC., COMMERCIAL TRANSPORT CORPORATION, VALLEY LINE SUPPLY AND EQUIPMENT COMPANY, MISSISSIPPI VALLEY BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., AMERICAN COMMERCIAL BARGE LINE COMPANY; corporations,

Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal From the United States District Court for the Southern District of Texas, Houston Division.

JURISDICTIONAL STATEMENT

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On Appeal From the United States District Court for the Southern District of Texas, Houston Division.

JURISDICTIONAL STATEMENT

Appellants, Gulf-Canal Lines, Inc., Commercial Transport Corporation, Valley Line Supply and Equipment Company, Mississippi Valley Barge Line Company, Federal Barge Lines, Inc., American Commercial Lines, Inc.,*

* Formerly American Commercial Barge Line Company.

appeal from the final judgment and decree of the United States District Court for the Southern District of Texas, Houston Division, which sustained a report and order of the Interstate Commerce Commission (Commission), and submit this Statement to show that the Supreme Court has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the three-judge United States District Court for the Southern District of Texas, Houston Division, filed August 26, 1966, is reported at 258 F. Supp. 864, and is set forth as Appendix A hereto. (App., pp. 1-17) The judgment of the district court dismissing the complaint is set forth as Appendix B hereto. (App., pp. 18-19) The report of the Interstate Commerce Commission is reported at 311 I.C.C. 103 and is reproduced as Appendix C hereto. (App., pp. 20-32) The Commission's order is reproduced as Appendix D hereto. (App., p. 33)

JURISDICTION

This action was brought by appellants herein pursuant to the provisions of 28 U.S.C. sections 1336, 1398, 2284, and 2321-2325, inclusive, and 5 U.S.C. section 1009, to restrain, annul, enjoin, and set aside a report and order of the Interstate Commerce Commission, entered August 25, 1960, in the Commission's Docket No. W-C-5, *Mississippi Valley Barge Co. Exemption, Section* 303(b), 311 I.C.C. 103. The judgment of the district court dismissing the complaint was filed August 26, 1966. Notice of appeal was filed by the appellants herein in the United States District Court for the Southern District of Texas on September 23, 1966. The time for docketing this appeal was extended to January 9, 1967, by order of the presiding judge of the three-judge district court.

The jurisdiction of the Supreme Court to review the judgment of the district court by direct appeal is conferred by 28 U.S.C. sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *I.C.C.* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744 (1963); *Mechling Barge Lines* v. *United States*, 376 U.S. 375 (1964).

STATUTES INVOLVED

Sections 303(b) and 303(f)(2) of the Interstate Commerce Act (49 U.S.C. sections 903(b) and 903(f)(2)), and section 10(e) of the Administrative Procedure Act (5 U.S.C. section 1009(e)), are set forth in Appendix E hereto. (App., pp. 34-35)

Particularly involved is the construction of the following portions of section 303(b) of the Interstate Commerce Act:

> (b) Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. . . . For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. . . .

QUESTIONS PRESENTED

The questions presented by this appeal arise from the judgment of the district court sustaining the report and order of the Commission in a proceeding entitled *Mississippi Valley Barge Co. Exemption, Section* 303(b), 311 I.C.C. 103 (1960). The Commission's report was issued in response to appellants' request for a declaratory order and took the form of an "interpretative ruling" construing the applicable sections of the Interstate Commerce Act (Act).

The following questions are presented by this appeal:

1. Did the Commission misconstrue that condition to the exemption in section 303(b) of the Interstate Commerce Act (49 U.S.C. 903(b)) which requires that a vessel "is being used for the carrying of not more than three such [bulk] commodities," in ruling that such condition is met only when the carrying vessel includes no non-bulk commodities?

2. Did the Commission misconstrue the Interstate Commerce Act in ruling that a water carrier which contracts with shippers to carry bulk commodities and then engages another carrier by water to perform towage for a part of the through voyage required by the said contracts with shippers, thereby subjects its bulk transportation to regulation by the Commission in the event that said tower carries more than three bulk commodities, or otherwise fails to meet the conditions to the application of the section 303(b) exemption?

3. Did the Commission's interpretation of the exemption provisions violate the certificate provisions of the Interstate Commerce Act insofar as it precludes a water carrier holding a certificate of public convenience and necessity authorizing the unrestricted performance of general towage from performing towage of bulk commodities for non-certificated water carriers?

STATEMENT OF THE CASE.

Appellants, Mississippi Valley Barge Line Company, American Commercial Lines, Inc., and Federal Barge Lines, Inc., are certificated common carriers authorized by the Interstate Commerce Commission to conduct regulated interstate transportation, including both freighting

(barge and towboat) and towing (towboat only) services, between ports and points on the rivers and waterways specified in their respective certificates which, collectively, embrace substantially all of the Mississipi River system. Appellants, Gulf-Canal Lines, Inc., Commercial Transport Corporation, and Valley Line Supply and Equipment Company, are, so far as here pertinent, non-certificated carriers whose water carriage is conducted under various exemptions from Commission regulation.*

The three certificated appellants can and do perform authorized general towage at published towage rates for the account of anyone seeking such service, including the three non-certificated appellants. The three non-certificated appellants are primarily engaged in freighting bulk commodities for shippers, which is exempt if conducted in compliance with the provisions of section 303(b). The case presents the question of whether the non-certificated appellants are in compliance with section 303(b) when they conduct their bulk freighting, in part, by hiring towage from the certificated appellants.

When Congress brought water carriage under the Commission's jurisdiction in 1940 (54 Stat. 929), it excluded from the transportation thereafter regulated, *inter alia*, "transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities." (Section 303(b)) A bulk-carrying "vessel" is defined (in the penultimate sentence of section 303(b)) as including "two or more vessels

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* Gulf-Canal is considered herein as a non-certificated carrier, although it is in fact a certificated common carrier, because so far as here pertinent, it conducts its transportation of bulk commodities under claim of exemption pursuant to section 303(b).

while navigated as a unit." Inland water carriage is normally conducted in multi-barge towloads of heterogeneous commodities navigated as a unit.

If a flotilla of barges contains any number of bulk commodities, but no non-bulk, it is a "solid bulk" towload, and is unquestionably exempt under section 303(b) when not more than three bulk commodities are included. If a flotilla of barges includes bulk and non-bulk, it is a "mixed" towload and, in appellants' view, the bulk transportation therein is exempt under section 303(b) if, in the words of the statute, "the cargo space of the vessel [flotilla] in which such [bulk] commodities are transported is being used for the carrying of not more than three such commodities." But the Commission has decreed that "mixing" destroys the bulk exemption regardless of the number of bulk commodities carried. It has read the "not more than three" condition as necessarily inferring the unstated corollary that a vessel (flotilla) claiming the section 303(b) exemption can include no non-bulk commodities.

The statutory condition has thus been applied as though it read "not more than three such commodities *and no non-bulk commodities*", apparently on the premise that one bulk plus one non-bulk equals more than three bulk commodities. This Commission-imposed "no-mixing" requirement has not heretofore been tested or challenged in court, except before the district court below which found that the words of the statute "justify, if they do not compel" the requirement (App., p. 7).

Barge companies in the bulk trades (including the non-certificated appellants) have for many years hired towage at the published charges maintained by certificated towers (including the certificated appellants) in completion of bulk affreightment contracts claimed to be exempt under section 303(b). To the extent a non-certificated carrier performs such transportation directly in solid three-or-less bulk tows, its exemption from regulation under section 303(b) is unquestioned; but a certificated tower normally moves the towed barge of bulk in a mixed towload along with its own freighted non-bulk, and the Commission regards this as precluding claim to the section 303(b) exemption.

Uncertainty arose as to whether this mixing affected the non-certificated carrier's exempt status, *i.e.*, whether the non-certificated carrier's transportation was vicariously tainted by its tower's conduct. Although the non-certificated carrier's claim to the bulk exemption under these circumstances seemed to be confirmed by the Commission's decision in *American Barge Line Co. Petition for Declaratory Order*, 294 I.C.C. 796 (1955), the practice was questioned and appellants therefore sought a declaratory order to secure a final and authoritative ruling.

The factual framework for the specific question presented to and resolved by the Commission is diagramatically set forth in the district court's opinion. (App., p. 4) Using the letter designations of that diagram and the terminology defined in the district court's accompanying footnote 5, the issue before the Commission was the status (regulated or exempt) of bulk carrier A which, after directly performing a portion of its contract of affreightment from X to Z, engages certificated carrier B to tow from intermediate point Y to destination Z. The Commission ruled that if B "mixes" the bulk towed for A with non-bulk commodities in the tow from Y to Z, this nullifies the

section 303(b) exemption otherwise applicable to A's freighting.

Appellants sought to set aside the Commission's report and order upon the grounds that nothing in the language or purpose of section 303(b) countenanced the "no mixing" requirement; that, even if that requirement were proper, it could not be applied to the fully-authorized mixed tows of a certificated carrier so as to vicariously affect the bulk transportation of another carrier whose direct operations qualified for the section 303(b) exemption; and that the Commission's ruling effectively and unlawfully precluded the free exercise of certificated appellants' unrestricted towage authority insofar as it prevented towing of bulk-loaded barges for the account of non-certificated carriers at published towage charges.

The district court sustained the "no mixing" requirement without significant discussion, apparently in reliance upon the sheer number of Commission cases which have applied, but never explained, it. This brought the district court to the question of "whose exemption is destroyed by . . . mixing"—i.e. to the validity of "vicarious taint." (App., p. 8) Noting the contradictions in past Commission rulings, the court sustained the instant ruling:

> We hold, in agreement with the second thoughts of Commission, that since Carrier A is responsible for the entire through trip, it cannot claim the benefits of the Sec. 303(b) three-bulk-cargo exemption unless the conditions of that section are strictly observed throughout the entire trip . . . [I]t must see to it that the towage performed by these other carriers complies with the conditions of that section. [App., p. 15]

The court confirmed that this construction "denies to the tower the right to seek and obtain towage business to be performed at rates and under conditions prescribed by lawfully filed towage tariffs." (App., p. 11)

The court accordingly sustained the report and order of the Commission, postponing its effectiveness if, as has been done, an appeal should be taken within thirty days of its order.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Every domestic water carrier, whether operating pursuant to Commission authority at published rates or under exemption from Commission regulation, will be directly and vitally affected by this case. Most of the nation's domestic water commerce consists of bulk cargo subject to the section 303(b) exemption. The efficiency of barge transportation depends in large measure upon the size of the towloads which can be navigated as a unit by a single towboat. That, in turn, is directly affected by whether the various barges to be transported are legally "compatible" *i.e.* can be freely intermingled to build the most efficient towload without unwanted regulatory consequences.

The "no mixing" requirement, which the district court would sanction, imposes an artificial and burdensome incompatibility in a period when the ever-increasing size of towboats plying the inland waterways makes the required separation of exempt and regulated carriage most inappropriate and costly. The district court recognizes that "the price [of the "no mixing" requirement] may be high" and that it "brings about transportation inefficiencies," but would blame Congress for the "unwanted result" of a legal interpretation which it endorses, while acknowledging that it is not compelled by the statute. (App., pp. 16-17)

If the "no mixing" requirement is upheld, water carriers are as vitally concerned with its application as with its validity, for the same reasons. The arrangement condemned by the Commission permitted non-certificated and certificated appellants to cooperate with one another to their mutual advantage in the conduct of their respective

exempt and regulated transportation businesses. But the Commission reads into every outstanding towage certificate an inferred prohibition against towage for non-certificated carriers. Certificated towers would lose the revenues from this mutually beneficial arrangement without offsetting gain to anyone, except possibly the railroads, to the extent that any penalty or imposed inefficiency would impair the water carriers' competitive position.

The important questions raised herein are of first impression. The district court's endorsements of the "no mixing" requirement and the application of that rule to affect vicariously the transportation by others are the only judicial pronouncements on these issues and this appeal provides the first occasion for an authoritative pronouncement by this Court. * The district court cites no controlling decisions because there are none. The "conceptual discrepancies and undulations" which it finds in the Commission pronouncements on the consequences of mixing manifestly require final and dispositive resolution. Since the questions presented are purely questions of law, this Court is in no sense bound by the Commission's interpretation of the applicable statute. Administrative Procedure Act, Section 10(e) (5 U.S.C. §1009(e)) *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 443-444 (1907); *Central Railroad Co. of New Jersey* v. *United States*, 257 U.S. 247, 256 (1921); *Alton R. Co.* v. *United States*, 287 U.S. 229, 239 (1932).

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*A related question was presented in *Commercial Transp. Corp. Exmep., Sec. 303(b) and 303(f)(2)*, 300 I.C.C. 66 (1957), which was sustained in *Commercial Barge Lines, Inc.* v. *United States*, 166 F. Supp. 867; aff'd *per curiam* 359 U.S. 342 (1959). This case is discussed herein below and, as will appear, its rationale is diametrically opposed to the vicarious taint doctrine here assailed. While its ruling implicitly assumes the existence of the "no mixing" requirement, the validity of that requirement was not tested, argued or even discussed.

I.

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE COMMISSION-IMPOSED "NO MIXING" REQUIREMENT IS JUSTIFED BY THE LANGUAGE OF SECTION 303(b) OR BY THE MANY COMMISSION DECISIONS WHICH HAVE REITERATED BUT NOT SUPPORTED THAT REQUIREMENT.

Appellants rest on the words of the Act, in the belief that Congress meant what it said. Congress exempted the transportation of bulk commodities when "not more than three such commodities" are carried. The Commission, not Congress, added the words "and no non-bulk commodities". The Commission's "no mixing" requirement can only be inferred by reading those words into section 303(b)—or by recasting the language in an altogether different mold.

In concluding that the Commission's "no mixing" requirement is justified, if not compelled, by the language of section 303(b), the district court could not rest upon the language enacted by Congress, but was forced to paraphrase section 303(b) in a manner which materially affects the meaning of the critical words. The district court paraphrases it thus: "The exemption applies only to a cargo consisting of three or less bulk commodities" and seems to draw comfort from the fact that "there is no reference whatsoever to nonbulk commodities" in section 303(b). (App., p. 7) But the statutory language of exemption is not, as the court suggests, directed negatively "only" to three or fewer bulk cargoes. It simply exempts the transportation of commodities in bulk "when" not more than three such commodities are carried.

It cannot, in reason, be said that more than three bulk commodities are carried in a vessel (or flotilla) containing only two bulk commodities *and* any number of nonbulk commodities. Two apples and a pear are not more than three apples. A negative restriction against non-bulk can-

not be inferred from the absence of any reference to non-bulk commodities.*

The district court seemed impressed by the "wealth" of Commission reports which have reiterated without reasoning a one-sentence informal ruling establishing the "no mixing" requirement.** (App., p. 7) But whatever judicial reverence might appropriately be accorded to a longstanding administrative interpretation rooted in reason or in some discernible regulatory purpose is not due to the *ipse dixit* found in the string of Commission citations which parrot the "no mixing" requirement.*** This Court has found that a settled administrative construction need not be followed "where the construction is doubtful" or "beyond the permissible limits of administrative interterpretation." *United States v. Missouri P. R. Co.*, 278 U.S. 269, 280 (1929); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369-370 (1946).

If, as the district court apparently believed, there is ambiguity in the governing statutory language, resort to legislative history would have been appropriate. But there is nothing in the legislative history of section 303(b) which remotely supports the Commission's position. The salient

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* If Congress intended to prohibit the simultaneous carriage of regulated non-bulk it would have done so. The parallel exemption of agricultural commodities in Part II of the Act specifically precludes the transportation of "any other [nonagricultural] property . . . for compensation" (Section 203(b)(6), 49 U.S.C. section 303(b)(6)).

** Administrative Ruling No. 6, March 20, 1941, CCH Fed. Carr. Rep. Para. 25,406.

*** The Ninth Circuit recently reversed a "settled" judicial construction which had begun "with a rather casual holding" and grown, like Topsy, through a "certain circularity in the judicial process." *Maier Brewing Company* v. *Fleischmann Distilling Corp.*, 359 F. 2d 156, 163 (1966).

reason for the bulk exemption was the repeatedly stated congressional conviction that regulation was unnecessary because bulk water carriage was "so much cheaper than land transportation that there is no substantial competition."* It is ironic, to say the least, that the Commission has forced an artificial inefficiency upon the water carrier industry in puported compliance with a section enacted in recognition and furtherance of the efficiency of bulk water carriage. The legislative history of section 303(b), if looked to for any purpose, clearly supports appellants' construction of that section which promotes, rather than inhibits, efficiency in the conduct of bulk water carriage.

Bulk water carriage should be exempt, as Congress intended it to be, without reference to the inclusion of other carriage fully subject to Commission regulation, so long as not more than three *bulk* commodities are included in the carrying vessel. The simultaneous conduct of transportation which Congress exempted, because of its efficiency, and transportation which it made subject to regulation contributes to the efficiency of both without contravening any discernible public policy. It should be permitted. If this Court determines that it shall be hereafter permitted, it is unnecessary to reach and decide the two remaining questions pertaining to the meaning and effect of the "no mixing" requirement.

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* Remarks of Chairman Lea of the House Committee (84 Congr. Rec. 9704, July 21, 1939). See also a similar statement by Senator Wheeler (86 Congr. Rec. 11765, September 9, 1940).

II.

MIXING BULK AND NON-BULK IN THE FULLY REGULATED TOW OF A CERTIFICATED TOWER CANNOT OPERATE TO VICARIOUSLY TAINT TRANSPORTATION BY, AND THEREBY PRECLUDE THE SECTION 303(b) EXEMPTION OF, A NON-CERTIFICATED CARRIER OF BULK WHICH SECURES THE PERFORMANCE OF REGULATED TOWAGE AT PUBLISHED RATES IN COMPLETION OF ITS OWN BULK AFFREIGHTMENT CONTRACT.

If the no mixing requirement is held valid, the further question is presented: Whose exemption is destroyed by the prohibited mixing under the postulated facts, the exemption of the tower who mixed, or the exemption of the carrier who engaged that tower? The bulk carrier's only contact with the mixed tow is its contract with the tower which does not dictate or bear upon performance in mixed or unmixed tows. Appellants submit that the mixing tower must assume the regulatory consequences of his own conduct. If mixing regulates, the mixer should be regulated.

The Commission and the district court concluded that a bulk freighting carrier must be held accountable for its tower's mixing, because "the transportation of a bulk commodity, even while in Carrier B's [the tower's] tow, is transportation for which Carrier A [the freighting carrier] contracted and for which it is *responsible*", and because both segments of the through voyage constitute "transportation by Carrier A, on its own or through intermediaries, in furtherance of its contract of affreightment." (App., p. 14 and p. 15) (emphasis supplied) But the physical consist of a tow, not the legal relation of the tower, or his principal, to the cargoes towed, determines its exempt or regulated status. *Commercial Transp. Corp. Exemp. Sec. 303(b) and 303(f) (2)*, 300 I.C.C. 66 (1957); sustained upon review in *Commercial Barge*

Lines, Inc. v. *United States*, 166 F. Supp. 867 (1958); aff'd *per curiam* 359 U.S. 342 (1959).

The *Commercial Transport* case held that the section 303(b) exemption was voided by the physical presence of non-bulk towed for certificated carriers under circumstances which qualify the tower for the "incidental" towing exemption in section 303(f)(2).* The bulk carrier's claim was that such non-bulk should not be "counted" in determining its exempt or regulated status as to the remaining barges in the tow. But the Commission ruled (and this Court affirmed, *per curiam*) that the bulk carrier's physical act of mixing bulk and non-bulk in the same tow destroys the section 303(b) exemption as to the bulk "regardless of how the responsibility to shippers under bills of lading may be divided among two or more carriers." (300 I.C.C. 66, 71)

Consistent with *Commercial Transport*, appellants here assert that when a tow fails to meet the conditions of the section 303(b) exemption the tower subjects itself (not its principal) to regulation, unless its towage is otherwise exempted.** To regulate an otherwise bulk-exempt carrier

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* Section 303(f)(2) provides that towage for certificated carriers is exempt as to the tower because incidental to the fully regulated transportation of the tower's principal, *i.e.*, "such transportation [towage] shall be considered to be performed by such carrier . . . as part of, and shall be regulated in the same manner as, the transportation by . . . water to which such [towage] services are incidental."

** If the towage is for a certificated carrier subject to Part III, it is exempt if "incidental" to the regulated affreightment services of that carrier, under the provisions of section 303(f)(2). But towage for a non-certificated affreightment carrier operating under claim of the bulk exemption is not "incidental" so as to qualify for that exemption. *American Barge Line Co. Petition for Declaratory Order*, 294 I.C.C. 796, 799 (1955).

because it is the legally "responsible" carrier, and therefore legally "present" in the mixed tow, is squarely contrary to the conclusion in the *Commercial Transport* case.*

The essential flaw in the district court's reasoning is manifested by its unwillingness to carry its adopted "vicarious taint" doctrine to its logical conclusion:

> We do not mean to imply that Carrier A should or would lose its exempt status were mixing to occur inadvertently through the act of an independent agency (such as Carrier B) which Carrier A could not have foreseen or controlled (as where accidental mixing occurred). [App., p. 15 footnote 16]

The statutory conditions to the section 303(b) exemption are not dependent on intent. The court's inclination to temper the inequity apparent in penalizing a carrier for conduct beyond its control, by giving weight to intent, should more appropriately have caused it to condemn the doctrine which led to such an absurd result. The administrative difficulty in policing not only a carrier's own activities, but also its awareness of the conduct of others, would be horrendous.

In contrast, the Commission's ruling in *American Barge Line Co. Petition for Declaratory Order*, 294 I.C.C. 796 (1955) makes each carrier responsible for the conduct of its own directly-performed transportation. The Commission there correctly ruled that the freighting

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* The Commission, with this Court's approval, has rejected the proposition that a freight forwarder's use of an independent motor carrier's services makes the "operations of that [motor] carrier the operations of the forwarding company." *Acme Fast Freight, Inc., Common Carrier Application*, 8 M.C.C. 211 (1938); sustained in *Acme Fast Freight* v. *United States*, 30 F. Supp. 968 (1940); aff'd 309 U.S. 638 (1940).

bill of lading bulk carrier which conforms its own operation to the conditions of the section 303(b) exemption does not forfeit that exemption by virtue of its tower's conduct, and that the tower is and should be fully regulated if its activities are so conducted as to be beyond the exemptive provisions of the Act. (294 I.C.C. 799-800). That interpretation is in conformity with reason and the wording of the applicable statutory provisions, and has governed the water carrier industry without complaint or incident until the issuance of the instant ruling. The instant ruling should be set aside.

III.

THE COMMISSION'S RULING IMPOSES AN UNWARRANTED AND HERETOFORE INAPPLICABLE RESTRICTION UPON THE TOWAGE CERTIFICATES HELD BY CERTIFICATED APPELLANTS.

The district court correctly notes that the Commission ruling, if sustained, "denies to the [certificated] tower the right to seek and obtain towage business to be performed at rates and under conditions prescribed by lawfully filed towage tariffs." (App., p. 11) This is because the certificated appellants conduct their regulated businesses in mixed tows and could not accept bulk barges tendered by non-certificated carriers, without aiding and abetting such carriers in what the Commission considers to be a violation of the Act. Thus the certificated appellants would suffer the loss of a valuable right which has been exercised continuously and without previous question since and prior to the issuance of their certificates in the 1940s.

The importance of this right is evident from the immediate and positive action taken by certificated towers when it was first challenged. The examiner's recommended report in *American Barge Line Co. Petition for Declara-*

tory Order, 294 I.C.C. 796 (1955), had concluded (in conformity with the Commission's conclusion here) that mixing by an exempt carrier's certificated tower operated to make the through bulk transportation regulated *ab initio*. This meant that an exempt carrier could not use a certificated tower, since the latter's mixing would subject the former's transportation to regulation without authority. Intervening certificated towers objected, stating:

> For many years, as a part of their regular common carrier operations, from time to time they [the certificated towers] have been employed by unregulated carriers to tow laden and empty barges over their regulated routes. Such barges have been and are incorporated in the regular tows of the intervenors, their regularly published tariff rates applicable to such towage have been and are assessed and collected . . .
>
> If the recommended conclusion of the Examiner were to be adopted by the Commission, such unregulated carriers no longer would be able to employ the services of intervenors . . . . and, more important from our point of view, these intervenors would lose the revenues accruing from such operations. [pp. 3-4]*

In response to these representations, the Commission reversed the Examiner and ruled that although the certificated carrier's towage was regulated, the bulk carrier's portion of the through movement was not. (294 I.C.C. 799-800)

Thus, fifteen years after water carrier regulation, a certificated tower's right to transport for a bulk carrier was first questioned, then confirmed. Five years later that right was extinguished, not only for these certificated appellants, but for every other water carrier holding towage authority.

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* This excerpt, from the exceptions of the intervening certificated towers, in the *American Barge Line* case, is set forth more completely in appellants' brief to the district court, pp. 22-23.

While this was not accomplished in a proceeding specifically concerned with certificate modification, it excludes an entire category of potential users of regulated towage from the lawful employment thereof. To this extent it is not unlike the Commission's action found unlawful in *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947). There, the Commission had issued Seatrain a certificate permitting common carriage of commodities generally and subsequently limited it to the transportation of loaded freight cars. Seatrain argued that this could "bar delivery or receipt of freight to or from any consignees except railroads," and the Court noted "that Seatrain had long transported goods of all kinds loaded in freight cars to consignees other than railroads." (329 U.S. at 428) The Court concluded that "the Commission was without authority" to limit the Seatrain certificate in this manner. (329 U.S. at 433) The same conclusion is warranted here.

CONCLUSION.

For the foregoing reasons, probable jurisdiction should be noted, and the case should be set for full hearing on the merits.

Respectfully submitted,

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January 1967

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

GULF CANAL LINES, INC., COMMERCIAL TRANSPORT CORPORATION, VALLEY LINE SUPPLY AND EQUIPMENT COMPANY, MISSISSIPPI VALLEY BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., AMERICAN COMMERCIAL BARGE LINE COMPANY; corporations,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants.

Civil Action No. 13649

Before HUTCHESON and BROWN, Circuit Judges, and INGRAHAM, District Judge.

BROWN, Circuit Judge:

By this suit[1] plaintiffs[2] seek to enjoin and set aside an

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[1] This action is brought under Secs. 1336, 1398, 2284, and 2321-25 of the Judicial Code, 28 U.S.C. Secs. 1336, 1398, 2284, and 2321-25, Sec. 17(9) of the Interstate Commerce Act, 49 U.S.C. Sec. 17(9) and Sec. 10 of the Administrative Procedure Act, 5 U.S.C. Sec. 1009.

[2] The six plaintiffs are all barge line companies engaged in interstate commerce common carriage by water in non-self-propelled barges with the use of separate towing vessels. Three of them, American Commercial Barge Line Company, Federal Barge Lines, Inc., and

order of the Interstate Commerce Commission entered in Mississippi Valley Barge Line Co., 311 I.C.C. 103 (1960).[3] The question here is whether the three-bulk-cargo exemption from regulation of Sec. 303(b) of the Act, 49 U.S.C. Sec. 903(b), continues to apply to an originating unregulated carrier where during a portion of the through trip the movement is performed for the originating carrier by a regulated tower who physically intermingles barges carrying non-bulk commodities with the barges of the originating carrier carrying bulk commodities. The Commission determined that the inclusion of non-bulk commodities during any portion of the through trip placed the entire carriage outside the exemption of Sec. 303(b) and subjected the originating carrier to Commission regulation. As we analyze the Commission's ruling we are convinced of its correctness and accordingly it is sustained.

Mississippi Valley Barge Line Company, are certificated common carriers by water authorized by their respective certificates to perform water carriage, including general towage for published, regulated towage rates (see note 5 *infra*). The three others, Gulf Canal Lines, Inc., Commercial Transport Corporation, and Valley Line Supply and Equipment Company, are non-certificated water carriers engaged in non-regulated activities including affreightment of bulk commodities exempt from regulation when transported within the conditions of Sec. 303(b) of the Act (see note 5 *infra*). These three exempt carriers, on occasion, employ one or the other of the three certificated carriers to perform towage of bulk-loaded barges in completion of contracts of affreightment between the exempt carriers and shippers of bulk commodities. Unless otherwise indicated, as used herein "plaintiffs" refers collectively to all six plaintiffs.

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[3] The Commission's order became administratively final on April 25, 1961, upon denial of a petition for reconsideration.

This proceeding originated before the Commission on petitions[4] requesting a declaratory order to remove uncertainty as to the construction and application of the Sec. 303(b) exemption. The petitions sought answers to questions based on hypothetical statements of fact. The factual

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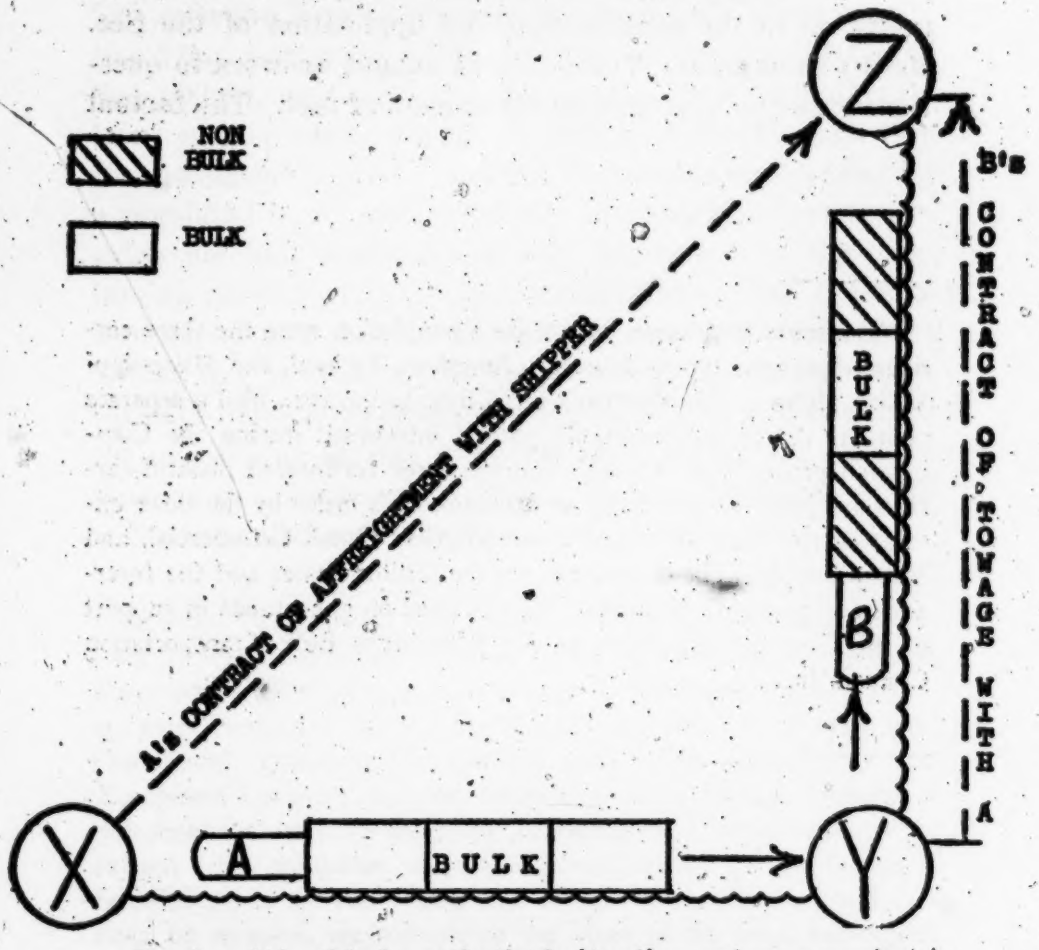
[4] The initial petitioners before the Commission were the three certificated plaintiffs (note 2 *supra*), American, Federal, and Mississippi Valley. John I. Hay Company and Coyle Lines, Inc., filed a separate petition. Additional interested parties intervened during the Commission proceedings. On this suit the three certificated plaintiff-carriers are joined in attacking the Commission's order by the three exempt carrier-plaintiffs (note 2 *supra*), Gulf Canal, Commercial, and Valley Supply. The defendants are the United States and the Interstate Commerce Commission. Hay entered an appearance in support of the Commission's order, as did Waterways Bulk Transportation Council, Inc.

framework presented on this appeal, and to which the Commission addressed its order, is as follows:[5]



Carrier A in this hypothetical situation enters a contract of affreightment with a shipper of bulk grain to transport a shipment of bulk grain from X to Z. Carrier A

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[5] The diagram and factual description are taken verbatim from Brief for Plaintiffs, p. 8. This presentation accurately and simply summarizes the actual hypotheticals before the Commission, set forth in an appendix to the Commission's order, 311 I.C.C. at 109-10.

As used by the parties and in this opinion the terms employed have this meaning:

(1) A "bulk commodity" is defined in Sec. 303(b) of the Act as one which is "loaded and carried without wrappers or containers and

furnishes a barge for this freightage service and tows that barge in a bulk exempt tow to intermediate point Y where it engages carrier B—who is authorized to provide regulated towage of grain between the points in question—to tow the barge to destination X for the published towage charge. The shipper of bulk is not a party to the contract of towage, nor is the tower (carrier B) party to the contract of affreightment. Carrier B's movement of the bulk-loaded barge from Y to Z is in a mixed tow intermingled with non-bulk being transported by B subject to regulation.

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is received and delivered by the carrier without transportation mark or count."

(2) A "bulk-exempt" carriage is defined in Sec. 303(b) as "two or more vessels while navigated as a unit," the cargo space of which "is being used for the carrying of not more than three such [bulk] commodities."

(3) "Towage" or "tower" pertains to that carriage or carrier by water where the transporter furnished only the non-cargo carrying power equipment for the movement of commodities loaded in barges furnished by others.

(4) "Bulk-exempt towage" is towage of bulk-loaded barges in a tow exempt from regulation under Sec. 303(b) of the Act.

(5) "Incidental towage" is towage of barges in a tow exempt from regulation under Sec. 303(f)(2) of the Act (49 U.S.C. Sec. 903(f)(2)).

(6) "Regulated" or "general" towage is a form of common (or contract) carriage by water subject to certificate and rate regulation by the Commission under the Act.

(7) "Affreightment", "freightage", or "freighting" pertains to that carriage by water where the transporter undertakes to furnish all of the instrumentalities of carriage, specifically including the cargo-carrying barge.

(8) "Bulk-exempt" freightage is freightage of bulk-loaded barges in a tow qualifying for the Sec. 303(b) exemption.

(9) "Regulated" freightage is freightage subject to certificate and rate regulation by the Commission under the Act.

(10) "Mixed tow" is a tow in which both bulk and non-bulk (regulated) commodities are carried.

The question posed based upon this factual setting was whether the inclusion by the tower, Carrier B, of the non-bulk commodities with Carrier A's bulk-loaded barges for a portion of the through trip covered by Carrier A's contract with the bulk-shippers deprives Carrier A of Sec. 303(b) three-bulk-cargo exemption during (1) that part of the movement (Y to Z) performed by Carrier B, as tower, in which Carrier A's bulk-loaded barges are included in a mixed tow; or during (2) the entire through trip (X to Z) for which Carrier A had contracted. The Commission ruled that the inclusion of non-bulk during any portion of the through trip destroyed the Sec. 303(b) exemption otherwise applicable to Carrier A and operated to subject to regulation Carrier A's contract of affreightment with the bulk shippers for the entire trip.

Plaintiffs assail this holding on two grounds. First, they emphasize that the Commission's interpretation of the Sec. 303(b) exemption requires not only that the express conditions of Sec. 303(b) (a cargo of not more than three bulk commodities) be met, but also that the cargo contain no non-bulk commodities. In other words, there may be no mixing. This "Commission-imposed" requirement is said to be improper and insupportable under the language of the statute. Second, plaintiffs vigorously assert that the status of the exempt carrier (Carrier A) cannot be disturbed or destroyed because of the addition of non-bulk commodities to an otherwise exempt cargo by a certificated, fully regulated tower employed by the exempt carrier to supply towage under towage tariffs for all or a portion of the through trip covered by the exempt carrier's contract.

At this late date no serious question is raised by plaintiffs' first argument. The language of Sec. 303(b) is plain and easily understandable:

"(b) Nothing in this chapter shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are * * * loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. * * *"[6]

The exemption applies only to a cargo consisting of three or less bulk commodities. It is the physical makeup of the cargo that determines whether the cargo is exempt under this section. And it is clear that the cargo must be considered in its entirety in appraising the impact of Sec. 303(b) on it. There is no reference whatsoever to non-bulk commodities. These considerations certainly justify, if they do not compel, the Commission's determination that the inclusion in a single tow of non-bulk commodities places the bulk cargo outside the ambit of the Sec. 303(b) exemption. And in light of the wealth of Commission decisions to this effect,[7] rendered as they were by the agency charged with administration of the Act, we are doubly sure that we should give approval to this long-maintained determination. See *Brotherhood of Maintenance Employes* v. *United States*, 366 U.S. 169, 179 (1961).

Plaintiffs' major attack is made upon the Commission's holding that the inclusion by Carrier B of non-bulk com-

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[6] Sec. 303(b), 49 U.S.C. Sec. 903(b).

[7] See e.g., Commercial Transp. Corp., 300 I.C.C. 66, 71 (1957), sustained sub nom. Commercial Barge Lines, Inc. v. United States, 166 F. Supp. 867 (E.D. Mich. 1958), aff'd per curiam, 359 U.S. 342 (1959); American Barge Line Co., 294 I.C.C. 796, 799 (1955), and the cases there cited.

modities in the otherwise exempt bulk cargo subjects Carrier A to regulation for the entire through trip. Assuming that mixing non-bulk with bulk commodities destroys the Sec. 303(b) exemption (as we have held above), plaintiffs ask *whose* exemption is destroyed by that mixing—the tower who mixed (Carrier B), or the freighting carrier (Carrier A) who engaged the tower.

For some years now the Commission has struggled to define the exact scope of the three-bulk-cargo exemption of Sec. 303(b). To understand fully the Commission's ruling in the instant case and our own views with regard to it, a brief survey of the exemption and several of the decisions construing it is helpful.

Part III of the Act, 40 U.S.C. Secs. 901 et seq, was enacted in 1940 and included the three-bulk-cargo exemption of Sec. 303(b). Shortly thereafter the Commission's staff ruled that a bulk-exempt cargo lost its exemption upon the inclusion of non-bulk commodities. Administrative Ruling No. 6, CHH Fed. Carr. Rep. para. 25406 (March 20, 1941). As previously pointed out, the Commission has consistently adhered to this view (note 7 supra).

Of importance to our case are two relatively recent decisions of the Commission. In *American Barge Line Co.*, 294 I.C.C. 796 (1955), Carrier A[8] issued a through bill of lading to shippers of bulk commodities for the transportation of the bulk cargo from Port X to Port Z. Carrier A physically performed a part of the through transportation, but at an intermediate point (Port Y) it employed Carrier B to tow the bulk-loaded barges for the remainder of the voyage. In performing this towage of the bulk-loaded barges Carrier B included barges subject to regulation.

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[8] The party (Carrier A, B, etc.) and place (X, Y, Z) designations here utilized correspond to those employed in the factual hypothetical presented in the case at bar.

At issue was the status of B, the tower. It was argued that the towage of the bulk-loaded barges by Carrier B was "incidental" [under Sec. 303(f)(2)] to the through transportation undertaken by Carrier A and thus should not be considered as transportation subject to regulation by Carrier B in a mixed tow. The Commission found otherwise. It ruled that since Carrier B had included non-bulk commodities with bulk commodities—an act which Carrier A could not do and retain the exemption of Sec. 303(b)—the towage by Carrier B was not incidental to Carrier A's transportation for the bulk shippers. It concluded that Carrier B was not exempt under Sec. 303(b), but rather this towage was subject to regulation because of the transportation of bulk and non-bulk cargoes. And of significance to our case, the Commission also commented on the exempt status of Carrier A. It decided that the mixing of bulk and non-bulk by the tower, Carrier B, subjected the tower to regulation for only that portion of the trip in which a mixed tow was present, (Y to Z), and did not affect the exempt status of the bulk-only leg (X to Y) of the trip.[9]

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[9] The Commission stated its views at 294 I.C.C. 799-800:

"Because of the issuance by carrier A of its bill of lading to the shipper by which the carrier contracts to transport a bulk commodity the entire distance from the origin on carrier A to the destination on carrier B, the contention is advanced that in these circumstances the entire movement must be considered as an entity and thus be either exempt or nonexempt. This contention is without merit. The issuance of a so-called through bill of lading is a mere incident and is not indicative of the exempt or nonexempt status of the transportation service. The well-established principle just referred to that the inclusion of non-bulk commodities in a tow with a bulk commodity has the effect of subjecting the entire cargo to regulation may not be extended to include the part of a multiple-carrier, line-haul transportation only of a bulk commodity in the circumstances here presented.* * *."

The second case is *Commercial Transp. Corp.*, 300 I.C.C. 66 (1957).[10] There Carrier A,[11] an unregulated carrier, entered a contract of affreightment with shippers of bulk commodities to transport such commodities as bulk-exempt cargoes from Port X to Port Z. Carrier B was a regulated common carrier by water with contracts of affreightment for transporting regulated commodities in the areas served by Carrier A. Occasionally Carrier B employed Carrier A as a tower of its non-bulk-loaded barges which were, of course, subject to regulation. On these instances Carrier A included Carrier B's non-bulk-loaded barges in the tow of its own bulk-loaded barges. Again at issue was the status of the tower, in this case Carrier A. Carrier A contended that since Carrier B's non-bulk-loaded barges were towed "incidentally" by Carrier A for another carrier (Carrier B), they were thus exempt from regulation under Sec. 303(f)(2) of the Act.[12] Consequently the fact that such barges were included in Carrier A's otherwise bulk-exempt tow should not destroy that exemption and subject the towage to regulation. The Commission, relying on *American Barge Line Co., supra,* held to the contrary. The Commission first acknowledged Carrier A's status as an "incidental" tower under Sec. 303(f)(2). "It is clear that when a towing service is performed by a person [Carrier A] for a water carrier [Carrier B] which is engaged in * * * transportation subject to regulation under * * * the Act, that the intention of Congress was not to subject to

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[10] Sustained sub nom. Commercial Barge Lines, Inc. v. United States, 166 F. Supp. 867 (E.D. Mich. 1958), aff'd per curiam, (1959) 359 U.S. 342, ... S.Ct. ....., ... L. ed .....

[11] See note 8, *supra.*

[12] 49 U.S.C. Sec. 903(f)(2).

separate and additional regulation the person [Carrier A] performing the incidental towing service." 300 I.C.C. 66, 69.

Consequently, viewing the "sole issue" to be "the proper application of Sec. 303(b) * * *", the Commission ruled that the inclusion of the non-bulk-loaded barges with the bulk-loaded barges destroyed the Sec. 303(b) three-bulk-cargo exemption to which Carrier A would otherwise have been entitled.

This brings us to the Commission decision now before us for review. Here the issue is the status of the affreighting carrier (Carrier A), not the status of the tower (Carrier B). Of course it is the tower (Carrier B) who complains, not because it befriends unregulated exempt bulk carriers (Carrier A) but because this denies to the tower the right to seek and obtain towage business to be performed at rates and under conditions prescribed by lawfully filed towage tariffs.

On this hypothesis Carrier A contracts for a through shipment of bulk commodities to be transported as a Sec. 303(b) exempt tow. Carrier B, a regulated tower, is hired to tow the bulk-loaded barges for a portion of the through trip, and while so doing the tower, Carrier B, includes in the tow barges loaded with non-bulk commodities. In answering the question as to the status of Carrier A the Commission ruled that Carrier B's mixing took Carrier A's contract of affreightment out of the exemption of Sec. 303(b) for the entire trip.

Plaintiffs strenuously assault this conclusion. Even accepting the Commission's position that mixing destroys the Sec. 303(b) exemption, plaintiffs assert that the exemption is lost only by Carrier B and then only for Car-

rier B's portion of the trip. This they say is only reasonable, since Carrier B has in fact physically mixed bulk with non-bulk, and since it is only during Carrier B's portion of the trip that mixing occurs and exists. They further contend that this conclusion is demanded by the *American Barge Line Co.* decision by virtue of the Commission's statement in that case (see note 9 *supra*) regarding the exempt status of Carrier A. Essentially their argument is that the mixing in Carrier B's tow can operate only to regulate Carrier B's towage *or* Carrier A's freightage, *but not both.* Consequently, the argument runs, since the Commission has heretofore held that Carrier B's towage is subject to regulation, it is now inconsistent, and totally improper, to hold that Carrier A's operations also are subject to regulation.

This argument has much force. Carrier B, whose towage must be regulated under previous Commission rulings, and whose towage in the instant case is performed pursuant to authorization by, and under regulated rates filed with, the Commission, is legally obligated as a regulated carrier to accept and transport tows offered to it, regardless of the *source* of that tow. Plainly Carrier B's performance of its towage agreement with Carrier A is legal. Thus it is energetically argued that since Carrier B's towage is legal and in compliance with Commission authorization, and therefore does not in any manner rest on any exemption, it should have no effect whatsoever on Carrier A's status as an exempt carrier under Sec. 303(b). The Commission, so the argument runs, has ample resources to control the transportation through regulation of the tower. This is the theory both of the "incidental towage" exemption under Sec. 303(f)(2), and the regulation of towage as such. See *Cornell Steamboat Co.* v. *United States* (1944), 321 U.S. 634, ... S.Ct. ....., ... L.. ed. .....

To this they add the further fact that what *American Barge Line* held not to be towage "incidental" to the operations of the bulk carrier under Sec. 303(f)(2) is now considered to be such.[13] And the rationale becomes all the more confusing since it now repudiates as ill-considered dictum the earlier declaration (See note 9, *supra*) that the through bill of lading shipment would not subject Carrier A to regulation during the unmixed leg (X to Y).

This leads the plaintiffs to offer this as a recapitulation: "* * the Commission report here under review would hold to be regulated the freighting service by carrier A which the 1955 ruling [American Barge Line] concluded was exempt, and would hold to be 'incidental', the towage by carrier B which the 1955 ruling had found 'not incidental' and 'not exclude[d] from regulation'."

But notwithstanding these conceptual discrepancies and undulations, we are compelled to the conclusion that the Commission's ruling in our case not only is sufficiently consistent with its own decisions, but also is a reasonable interpretation of the Sec. 303(b) exemption as well. The plaintiffs correctly observe that the Commission has denied the Sec. 303(b) exemption in situations similar to the present case *because of the physical mixing of non-bulk commodities with bulk commodities.* Without question physical intermingling of bulk and non-bulk commodities occurs here. And this, we believe, effectively extinguishes the Sec. 303(b) exemption for *all* carriers who during the time the mixing occurs perform "transportation" services essential to consummating the affreightment contract.

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[13] The report states:

> "Under the circumstances posed * * *, when Carrier A engages Carrier B to supply the power * * * it * * * * in effect, merely engages B as the incidental tower. * * *" 311 I.C.C. 103, 107.

In *American Barge Line Co.* and *Commercial Transp. Corp.*, the Commission looked to the status of the *tower* and held it subject to regulation. We cannot agree that these decisions preclude regulation of the originating carrier, here Carrier A.[14] For the transportation of the bulk commodities, even while in Carrier B's tow, is transportation for which Carrier A contracted and for which it is responsible. This is so notwithstanding Carrier A's use of Carrier B, an independent agency, to effectuate the actual physical movement of the bulk cargo. The contract of towage between Carrier A and Carrier B was merely a convenient means employed by Carrier A to accomplish its contractual obligations to the bulk shippers.[15]

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[14] We would add that our position is not intended to and does not require regulation of both Carrier A's affreightment and Carrier B's towage. Our holding, and that of the Commission, is that Carrier A's affreightment for the entire trip becomes subject to regulation by virtue of the mixing that occurs during Carrier B's towage in furtherance of that affreightment. Since Carrier A is, and must be, thus a regulated carrier, then Carrier B's towage clearly comes within the provisions of the Sec. 303(f)(2) "incidental towage" exemption. And while apparently this is contrary to the Commission's holding in *American Barge Line Co.*, yet in that case the only question concerned the status of the tower, Carrier B. The Commission readily admitted during oral argument that its holding in the present case, that Carrier A is subject to regulation, would enable Carrier B now to qualify for the incidental towage exemption of Sec. 303(f)(2).

[15] Carrier A contracted with the bulk shippers for the entire trip, and thus was obligated to transport the bulk commodities from Port X to Port Z. And *Carrier A's movement* of the bulk commodities by means of towage supplied by Carrier B plainly *was "transportation" by Carrier A* within the definition of that term under the Act. Section 302(h) of the Act, 49 U.S.C. Sec. 902(h), defines "transportation" to include "the use of any transportation facility (*irrespective of ownership* or of any contract, express or implied, for such use) * * *" (emphasis added). "Transportation facility" is defined in Sec. 302(g) of the Act, 49 U.S.C. Sec. 902(g), as "any vessel * * * or any other instrumentality or equipment of any kind, used in or in connection with transportation by water subject to this chapter."

Thus the movement of the bulk commodities from Port X to Port Z—the entire trip for which Carrier A contracted with the bulk shippers—was transportation by Carrier A, on its own or through intermediaries, in furtherance of its contract of affreightment. We hold, in agreement with the second thoughts of Commission, that since Carrier A is responsible for the entire through trip, it cannot claim the benefits of the Sec. 303(b) three-bulk-cargo exemption unless the conditions of that section are strictly observed throughout the entire trip.

This of course does not mean that Carrier A cannot seek and obtain towage by independent towers to assist it in fulfilling its contracts of affreightment with bulk shippers. But it does mean that if Carrier A does so, then to retain the Sec. 303(b) exemption it must see to it that the towage performed by these other carriers complies with the conditions of that section. The result is that during the course of a through movement for which it has contracted with shippers of bulk Carrier A cannot employ transportation facilities which will cause or bring about a mixture of non-bulk and the bulk commodities for which Carrier A claims an exemption.[16] To this extent Carrier A is less free to arrange its affairs as it sees fit than are other originating carriers and shippers. Whereas generally a carrier may contract with a regulated tower for towage of vessels and not be concerned with, or penalized for, what that tower does with those vessels, a party who claims the exemption of Sec. 303(b) and utilizes towers—

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[16] We do not mean to imply that Carrier A should or would lose its exempt status were mixing to occur inadvertently through the act of an independent agency (such as Carrier B) which Carrier A could not have foreseen or controlled (as where accidental mixing occurred).

even regulated towers—in connection with the movement of bulk-exempt cargoes must see to it that the towers refrain from mixtures which forfeit the Sec. 303(b) exemption. The price for bulk exemption is no mixing. The price may be high. But so long as the antimixing rule survives this puts the exempt carrier under a double restraint: the exempt carrier may not mix; nor may he use otherwise available facilities which result in mixing. The sanction is not therefore on the tower. Rather it is directly on the one claiming exemption.

We are, as we have several times pointed out, fully aware of the Commission's statement in *American Barge Line Co.* regarding the exempt status of Carrier A.[17] While apparently at odds with the position now taken by the Commission, this does not bind us. The Commission has two explanations. First, as noted by the Commission in the order here under attack, the principal question in *American Barge* was the status of Carrier B, the tower. The language relied on by plaintiffs herein was not at all necessary to the ruling in that case. And the Commission avoided any general statement regarding the exempt status of Carrier A. It carefully hedged its discussion with "in the circumstances here presented". Next, it makes it quite plain that it no longer adheres to that view. As would a court, the Commission we suppose has the right, indeed the duty, to change its mind when it sees the error of its ways.

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[17] See note 9 *supra* and accompanying text.

We are convinced that the Sec. 303(b) exemption applies only if at no time during the entire through trip for which the exemption is claimed bulk and non-bulk commodities are not to be transported in the same tow. Here that requirement is not met. The Commission was correct in ruling that Carrier A is not exempt, and accordingly its order will be sustained and plaintiff's complaint will be dismissed. As the issue is perhaps of extraordinary importance and has many built-in difficulties, our order will postpone the effective date of the Commission's order until final action by the Supreme Court if an appeal is timely taken.

If, as argued so strenuously, this application of Sec. 303(b) brings about transportation inefficiencies which discriminate against regulated carriers of bulk commodities, or regulated towers, or both, the remedy is to be in Congress. Through the Commission and otherwise it has been made aware of these problems and their possible consequences. If Congressional handiwork now produces unwanted results it is for Congress, not the Judiciary, to right the machinery.

ORDER ENFORCED.

PETITION DISMISSED.

(sgd) J. C. Hutcheson, Jr.
United States Circuit Judge

(sgd) John R. Brown
United States Circuit Judge

(sgd) Joe Ingraham
United States District Judge

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

GULF CANAL LINES, INC., COMMERCIAL TRANSPORT CORPORATION, VALLEY LINE SUPPLY AND EQUIPMENT COMPANY, MISSISSIPPI VALLEY BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., AMERICAN COMMERCIAL BARGE LINE COMPANY; corporations,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants.

Civil Action No. 13649

Before HUTCHESON and BROWN, Circuit Judges, and INGRAHAM, District Judge.

The COURT, for the reasons expressed in its opinion, being of the view that the order of the Interstate Commerce Commission is valid and should be enforced, accordingly ORDERS and ADJUDGES:

First: The order of the Commission is valid and to be ENFORCED;

Second: The complaint shall be, and hereby is, DISMISSED;

Third: The effective date of the Commission's order is postponed until final action by the Supreme Court if an appeal is taken within thirty days.

Done at Houston, Texas, August 26, 1966.

(sgd) J. C. Hutcheson, Jr.
United States Circuit Judge

(sgd) John R. Brown
United States Circuit Judge

(sgd) Joe Ingraham
United States District Judge

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. W-C-5

MISSISSIPPI VALLEY BARGE LINE COMPANY EXEMPTION, SECTION 303(b)

Decided August 25, 1960

On petition, transportation services entirely by water carrier of commodities in bulk, in circumstances whereby beginning at an intermediate point, such commodities are towed in a unit with nonbulk commodities, found not to be exempt from regulation under the provisions of section 303(b) of the Interstate Commerce Act. Proceeding discontinued.

Richard J. Hardy, Nuel D. Belnap, Harry C. Ames, Donald Macleay, and *W. Y. Wildman* for petitioners.

Robert J. Bernard, J. D. Feeney, Thomas J. Houser, Ed White, James W. Nisbet, and *E. R. Leigh* for rail replicants.

Kenneth J. McAuliffe, Paul T. Truitt, Walter D. Matson, Donald Macleay, Russell S. Bernhard, and *W. Y. Wildman* for shipper organizations and water-carrier replicants.

REPORT OF THE COMMISSION ON PETITION

DIVISION 1, COMMISSIONERS MURPHY, GOFF, AND HERRING

BY DIVISION 1:

By petitions filed August 31, 1959, Mississippi Valley Barge Line Company, Federal Barge Lines, Inc., and American Commercial Barge Line Company, hereinafter

called the Mississippi carriers, and John I. Hay Company and Coyle Lines, Incorporated, hereinafter called Hay and Coyle, respectively, seek declaratory orders under the provisions of section 5(d) of the Administrative Procedure Act, to remove uncertainty as to the construction and application in described circumstances of the exemption from regulation as provided in section 303(b) of the Interstate Commerce Act. The Mississippi carriers filed a brief in support of their position. The petitions were docketed and notice thereof published in the Federal Register. Hay and Coyle replied to the petition filed by the Mississippi carriers. Additionally, the Louisville and Nashville Railroad Company, class I rail carriers in the western district, the Manufacturing Chemists Association, Inc., and the National Plant Food Institute, hereinafter called the association and the institute, respectively, filed replies to the petitions. The Pennsylvania Railroad Company was permitted to intervene and become a party to the proceeding.

Petitioners, except Coyle, are authorized to operate as common carriers by water by barge and towboat, hereinafter called freighting,[1] of general commodities as here pertinent, between ports and points along the Mississippi River, the Illinois Waterway, and certain tributaries of the Mississippi River. They also hold authority to perform towing services in territories generally coextensive with their freighting authorities. Coyle is authorized to perform both freighting and towing services along the Gulf Intracoastal Waterway, the Mississippi River below and including Baton Rouge, La., and certain other inland

[1] "Freighting" denotes service which includes furnishing by the carrier of the cargo space, such as a barge, and of motive power (generally supplied by the towboat).

waterways entering the Gulf of Mexico. The association and the institute represent shippers which move, by water carriers, large quantities of chemicals, coal, fertilizers, and other commodities in bulk, under the exemption from regulation provided by section 303(b) of the act.

Petitioners seek answers to questions based on hypothetical statements of facts. The questions and statements of facts are set forth in the appendix hereto. The association and the institute contend that the petitions clearly spell out matters which present a question for an adversary proceeding rather than a proceeding looking toward a declaratory order; that the shipping public is entitled to have the questions resolved in a case presenting clearcut issues based on actual facts rather than on hypothetical statements of facts; and that the petitions should be denied or dismissed. The railroads assert that the considered hypothetical facts relate to transportation in the same tow of bulk traffic with nonbulk traffic which, they maintain, clearly was found not to be within the 303(b) exemption in *American Barge Line Co. Petition For Declaratory Order,* 294 I.C.C. 796, hereinafter called the *American Barge Line* case, and *Commercial Transp. Corp., Exemp., Sec. 303(b) and 303(f)(2),* 300 I.C.C 66, hereinafter called the *Commercial Transport* case (reviewed and sustained in *Commercial Barge Lines, Inc., v. United States,* 166 F. Supp. 867, by the District Court for the Eastern District of Michigan, which judgment was affirmed by the Supreme Court in 359 U.S. 342. They contend that the petitions should be dismissed, or in the alternative, if the Commission holds that the petitioners may be considered under section 5(d) of the Administrative Procedure Act, that such petitions be denied by an

order holding that the exemption provided by section 303(b) of the act does not apply in the circumstances presented.

The instant petitions seek relief under section 5(d) of the Adminstrative Procedure Act. The provisions of section 5, however, are expressly limited in their applicability to matters which are required by statute to be determined "on the record after opportunity for an agency hearing." The nature of the instant proceeding is not such as to require an agency hearing within the provisions of section 5 of the Administrative Procedure Act and, accordingly, the petitions were improperly filed thereunder. We may, however, under our authority in general, entertain petitions seeking interpretive rulings and opinions. Compare *Atlantic Frt. Lines, Inc.—Petition For Declaratory Order,* 51 M.C.C. 175. In certain instances in the past the Commission has entertained petitions of the type presented herein and has issued reports answering hypothetical questions. In view of this past practice and the absence of any prior notice to the contrary, we will entertain the instant petition under our general interpretive authority. We wish to point out at this time, however, that we do not believe it is in the public interest to entertain and issue decisions with respect to hypothetical questions posed by a relatively small segment of those who would be affected, and, in the absence of compelling circumstances, future petitions of this type will be dismissed.

Section 303(b) of the act exempts the transportation by water of bulk commodities when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three commodities. For the purpose of the subsection, it further pro-

vides that two or more vessels while navigated as a unit shall be considered to be a single vessel. In construing these provisions, the Commission, division 4, consistently has held that the exemption provided therein does not apply when nonbulk commodities and bulk commodities, although in separate vessels, are moved in tows as a unit. *Portland Tug & Barge Co. Ext.—Washington— California*, 265 I.C.C. 325, 335; *Mulqueen Contact Carrier Application*, 250 I.C.C. 436, 439; and *Jacob Rice & Sons Contract Carrier Application*, 250 I.C.C. 727, 729. However, some confusion has arisen concerning the applicability of the exemption to the services of carriers which undertake by contracts with shippers to provide the complete transportation service as against those which perform towing services for the originating or freighting carrier.

In the *American Barge Line* case, on which the Mississippi carriers rely, the question there posed was:

> Does the inclusion of the barge carrier "A" loaded with bulk freight in such a tow of Federal [carrier B] destroy the exemption which the transportation being performed for Carrier "A" would have if Carrier "A" used its own power in towing the bulk shipment in question?

Division 4 concluded that the considered transportation of commodities in bulk by carrier B in a unit with non bulk commodities is not transportation exempt from regulation under the provisions of section 303(b) of the act, and discontinued the proceeding. With respect to the collateral question relating to the status of transportation performed by carrier A (the freighting carrier) prior to the inclusion of its bulk-commodity barge or barges in carrier B's tow, the division observed, upon the factual situation there described, that such prior trans-

portation was not affected by the subsequent mixed tow[2] and loss of exempt status. In this connection, the division said:

> Because of the issuance by carrier A of its bill of lading to the shipper by which the carrier contracts to transport a bulk commodity the entire distance from the origin on carrier A to the destination on carrier B, the contention is advanced that in these circumstances the entire movement must be considered as an entity and thus be either exempt or nonexempt. This contention is without merit. The issuance of a so-called through bill of lading is a mere incident and is not indicative of the exempt or nonexempt status of the transportation service. The well-established principle just referred to that the inclusion of nonbulk commodities in a tow with a bulk commodity has the effect of subjecting the entire cargo to regulation may not be extended to include the part of a multiple-carrier, line-haul transportation only of a bulk commodity in the circumstances here presented.

In the *Commercial Transport* case, the question presented was whether the inclusion of a barge of regulated nonbulk commodities, in an otherwise solid tow of dry-bulk commodities moving under the section 303(b) exemption, would destroy such exemption as to the tower. In its report, the division found, as here pertinent, that the transportation of commodities in bulk in a unit with non bulk commodities is not transportation exempt from regulation under the provisions of section 303(b) of the act. Thus the Commission has consistently held that the bulk-commodity exemption does not apply to commodities transported in mixed tows. It also held that the inci-

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[2] A mixed tow, as that term is hereinafter used, is a tow in which both bulk and nonbulk freight are transported.

dental towage performed for other carriers subject to the act is exempt from regulation under the provisions of section 303(f)(2).

Petitioners seek an expression from the Commission to remove uncertainty as to the status, under the act, of persons performing the towing services for the freighting carrier based on the submitted statement of facts. Relying on the *American Barge Line* case, *supra*, the Mississippi carriers contend that carrier A, when under an affreightment contract with the shipper to transport bargeloads of bulk freight as exempt from regulation on agreed rates not published and filed with this Commission, does not subject itself to regulation upon transferring at point Y (the intermediate point), the bargeloads of bulk freight to carrier B which tows such barges in mixed tows to point of destination; and Hay and Coyle contend that carrier A, in the same circumstances, is exempt from regulation as long as it moves a tow containing not more than 3 bulk commodities, but subjects itself to regulation for that part of the movement of its bargeloads of bulk commodities when they are being transported by carrier B in a mixed tow. Stated otherwise, the Mississippi carriers argue that the entire transportation to point of destination undertaken by carrier A is exempt under section 303(b), and that it cannot be held to forfeit that exemption by reason of the mixed tow of carrier B beyond point Y in connection with which the latter performs regulated transportation; Hay's and Coyle's position is that the section 303(b) exemption ceases to exist with respect to transportation by anyone, including the contracting carrier A during the period when the bulk commodity is in a mixed tow. The Mississippi carriers take the

position that, in the circumstances presented, carrier B as a tower is subject to regulation, and if it charges carrier A its published towing rates the arrangement does not disturb the status of carrier A, and is lawful.

A study of the legislative history of section 303(b) leaves no doubt that Congress intended to exempt the transportation of commodities in bulk, but it is clear that such exemption is to apply only if not more than three bulk commodities are being transported in a single vessel which, in this case, means two or more vessels being navigated as a single unit. See *Commercial Barge Lines, Inc.*, v. *United States, supra.* It is likewise clear that had the tow of not more than three bulk commodities been continued uninterruptedly from point of origin to final destination, or had carrier B continued the tow as one consisting of not more than three bulk commodities, such transportation would have been within the exemption and not subject to regulation as to any of the carriers participating therein. Under the circumstances posed in the submitted statements of facts, when carrier A engages carrier B to supply the power needed to transport the bulk commodity bargeloads to point Z it does not, insofar as the through movement is concerned, relinquish its control over the bargeload of bulk freight as the freighting carrier but, in effect, merely engages B as the incidental tower. Because of the limitation of the subsection, that not more than three bulk commodities may be carried in the same vessel or tow, the transportation of all the commodities in the tow becomes subject to regulation. Accordingly, carrier A, if it holds authority to transport the considered traffic from point X to point Z, must observe its Commission filed rate from and to such points, or may participate in the transportation only to the extent

of its authority and observe the rates and charges of the participating carriers, including itself, as published and on file with this Commission. If carrier A has no authority to perform the transportation which it contracts to do as the freighting carrier, it must perform the transportation pursuant to the limitations of the exemption in order to be within its purview, otherwise it should discontinue such practices, or it subjects itself to prosecution for operating without authority. Compare *Commercial Barge Lines, Inc.*, v. *United States, supra* and *Water Carrier Service on Great Lakes, Nonowned Vessels,* 285 I.C.C. 52.

In reaching our conclusions, we have also considered the purpose of the certificate and permit provisions of the act regulating the entry of new carriers into the transportation field and extension of the operations of the existing carriers. The device of contracting with shippers to transport bulk commodities at rates different from those published and on file with the Commission, and then employing the towing services of others as posed in the questions, would permit the transportation of bulk commodities free of regulation irrespective of the conditions of the exemption; and carriers not holding certificates or permits would be able to circumvent the certificate, permit, and tariff provisions of the act and enter the transportation field, or extend their operations merely by utilizing the towing services of authorized carriers. Clearly if the bulk-commodity exemption is to be applicable, the limitations thereof must be observed for the entire continuous movement.

In reaching this conclusion we are not unmindful of the dictum in the *American Barge Line* case, *supra.* There the circumstances involved a part of a multiple-carrier, line-

haul transportation service; however, the continuity of the through movement in the involved transportation was not shown or was not clearly discussed and understood. Here it is clear that carrier A, in contracting with the shipper to transport bulk-commodity shipments to point of destination as through continuous movements within terms of the exemption, is the freighting carrier for the movements; and because it transfers the shipments to other carriers for the remainder of the journey under incidental towage arrangements, the continuity of its responsibility for the through shipment is not destroyed. In fact, carrier A again takes actual possession of the shipment at destination and makes delivery to the consignee. The Commission, division 4, has held that where a carrier participates in through transportation under common arrangements with other carriers under circumstances not in conformity with the limitations imposed in connection with exemption provisions, such entire transportation is not within the exemption claimed. Compare *Water Carrier Service on Great Lakes, Nonowned Vessels, supra, Bernert Common and Contract Carrier Application,* 250 I.C.C. 756, and *American Barge Line Co. Applications,* 265 I.C.C. 231.

We find that the transportation services in their entirety by a water carrier, in circumstances whereby beginning at some intermediate point in transit, commodities in bulk are towed in a unit with nonbulk commodities, are not exempt from regulation under the provisions of section 303(b) of the Interstate Commerce Act. An order will be entered discontinuing the proceeding.

APPENDIX

Hypothetical statement of facts set forth by the Mississippi carriers, petitioners

Carrier A—the person to be considered—is a carrier by water engaged in the transportation of commodities in bulk under the section 303(b) exemption. Carrier A furnishes to a shipper at point X an empty barge which the shipper loads with bulk grain. Carrier A agrees to transport said grain to point Z on an agreed rate which is not published or filed with the Commission. The water route from X to Z passes through Y. Carrier B (a petitioner herein) holds a certificate authorizing the performance of general towage for hire from points X and Y to point Z and publishes and files with the Commission rates covering such general towage services. Carrier A transports the barge of grain from X to Y in its own solid bulk tow. At Y, carrier A engages carrier B to tow the barge loaded with grain to Z on carrier B's published and filed towage rates. Carrier A takes possession of the barge at Z and delivers it to the consignee specified in its agreement with the shipper. Carrier B performs the towage as aforesaid in a tow containing nonbulk freight. Said nonbulk freight may be moving in the affreightment service of carrier B for shippers, or in the regulated general towage service of carrier B for other persons, or in towage exempt as to carrier B because performed for another regulated carrier under the arrangement dealt with in section 303(f) (2).

Questions:

1. Does the inclusion of nonbulk freight in the tow in which the barge of grain is towed from Y to Z by carrier B for carrier A make the services of carrier A between the same points subject to regulation?

2. Is the answer to question No. 1 any different if the regulated general towage by carrier B is for the whole journey from X to Z, rather than for the part of the journey represented by the haul from Y to Z?

3. Is the answer to question No. 1 any different in a case in which carrier A holds affreightment authority covering grain from X to Z and publishes and files rates thereon different from those agreed to, than when carrier A holds no such operating authority and, consequently, maintains no such published and filed rates?

4. If the answer to question No. 1 is in the affirmative, does it follow that the service performed by carrier A from X to Y in its own solid bulk tow is also subject to regulation?

Hypothetical statement of facts set forth by Hay and Coyle, petitioners

1. Carrier A is an unregulated barge line operator engaged in the transportation of commodities "in bulk" under the exemption afforded by section 303 (b). It enters into a freighting service (defined in footnote 1 in the report) contract for the movement of a bargeload of such a commodity from point X to point Y and furnishes a barge which is loaded by the shipper. Carrier A then delivers that barge to carrier B for towage from point X to point Y. Carrier B is a certificated common carrier barge line operating under regulation, who mingles the barge in one of its regular tows containing barges loaded with nonbulk commodities. Carrier B transports the barge from point X to point Y, where it returns the barge to carrier A, who pays carrier B the latter's published rate for towage, and makes delivery to consignee.

2. Carriers A and B are certificated common carrier barge lines, both operating between points X and Y, both having published and on file with the

Commission rates covering the performance of a freighting service in the transportation of a bulk commodity from X to Y, and both also having published and on file with the Commission rates on a considerably lower level covering only towage of a barge loaded with such commodity from X to Y. Either (or both) enters into contracts with shippers for the transportation of bulk commodities from X to Y as exempt transportation under the exemption in section 303(b) at rates lower than its freighting rates published and on file with the Commission, and then employs the other to perform towage, in the same manner as described in situation 1, above.

3. Carrier A is owned or controlled by Carrier B. In all other respects, the factual situation is the same as described in situation 1, above.

Question:

Under each of the three factual situations set forth above, does the mingling and movement of the barge of carrier A loaded with the bulk commodity in a tow of carrier B containing nonbulk commodities destroy the exempt status under section 303(b) of the freighting service which carrier A has contracted and undertaken to perform for the shipper?

APPENDIX D

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 25th day of August, A. D. 1960.

No. W-C-5

MISSISSIPPI VALLEY BARGE LINE COMPANY EXEMPTION, SECTION 303(b)

This proceeding having been duly submitted and full investigation of the matters and things involved having been made, and the said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission, division 1.

Harold D. McCoy,
Secretary.

APPENDIX E

I. Section 303(b) of the Interstate Commerce Act, 49 U. S. C. §903(b), provides:

(b) Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended.

II. Section 303(f)(2) of the Interstate Commerce Act, 49 U.S.C. §903(f)(2), provides:

(f) Notwithstanding any provision of this section or of section 302, the provisions of this part shall not apply—

* * *

(2) to transportation by water by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to part II, or a water carrier subject to this part, in the performance within terminal areas of transfer, collection, or

delivery services, or in the performance of floatage, car ferry, lighterage, or towage; but such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental.

III. Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 1009(e), provides:

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.